

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

Moshe K.,

Claimant,

and

North Los Angeles County Regional Center,

Service Agency.

OAH No. 2012110307

DECISION

This matter was heard by June R. Lehrman, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 28, 2013, in Van Nuys, California. The North Los Angeles County Regional Center (Service Agency) was represented by Rhonda M. Campbell, Contract Officer. Claimant Moshe K.¹ was represented by his father (Father).

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on March 28, 2013.

ISSUE

Is Claimant eligible to receive services from the Service Agency?

EVIDENCE RELIED UPON

Documents: Service Agency's Exhibits 1-14

Testimony: Sandi Fischer, PhD; Father

¹ Initials and family ties are used to protect the privacy of claimant and his family.

FACTUAL FINDINGS

1. Claimant was born October 31, 1989, and is currently 23 years old.
2. Claimant has applied to receive services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act). In a letter and Notice of Proposed Action dated October 23, 2012, the Service Agency denied eligibility, asserting that Claimant did not have a condition that made him eligible for services. Claimant submitted a request for fair hearing dated October 29, 2012, and this hearing ensued.
3. Claimant contends that he should be eligible for services due to his functional limitations in the areas of self-care; learning; mobility; self-direction; capacity for independent living; and economic self-sufficiency. He contends he meets the Lanterman Act's criteria for eligibility under the categories of autism, mental retardation or under the "fifth category" of eligibility.² For the reasons set forth below, Claimant's appeal is granted.
4. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association; also known as DSM-IV-TR) is a generally-accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders, including Autistic Disorder³ and Mental Retardation .

Definition of Autistic Disorder

5. The DSM-IV-TR discusses Autistic Disorder in the section entitled "Pervasive Developmental Disorders." (DSM-IV-TR, pp. 69 - 84.) The five "Pervasive Developmental Disorders" identified in the DSM-IV-TR are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS).⁴

² As discussed below, the fifth category refers to a condition that is closely related or similar to mental retardation or requires treatment similar to that required for mentally retarded individuals.

³ As discussed below, the list of eligible conditions in the Lanterman Act uses the word "autism," while the DSM-IV-TR uses the phrase Autistic Disorder. For purposes of this Decision, they are interchangeable.

⁴ As discussed below, only "autism" or Autistic Disorder is an eligible diagnosis for regional center services. A claimant with a pervasive developmental disorder which is not Autistic Disorder is not eligible to receive regional center services. Moreover, as discussed below, Claimant fails to establish that he has either Autistic Disorder or any of the other pervasive developmental disorders.

6. The DSM-IV-TR lists criteria which must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

- (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
- (b) failure to develop peer relationships appropriate to developmental level
- (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)
- (d) lack of social or emotional reciprocity

(2) qualitative impairments in communication as manifested by at least one of the following:

- (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime)
- (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
- (c) stereotyped and repetitive use of language or idiosyncratic language
- (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
- (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
- (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
- (d) persistent preoccupation with parts of objects

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B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

(DSM-IV-TR, p. 75.)

7. The DSM-IV- TR, section 299.00 states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual.

(*Id.* at p. 70.)

Definition of Mental Retardation

8. The DSM-IV-TR describes Mental Retardation as follows:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations

below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(*Id.* at pp. 41 - 42.)

9. Regarding Mild Mental Retardation (I.Q. level of 50-55 to approximately 70), the DSM-IV-TR states:

[Persons with Mild Mental Retardation] typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to

approximately the sixth-grade level. By their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

(*Id.* at pp. 42 - 43.)

10. Regarding the differential diagnosis of Borderline Intellectual Functioning (IQ level generally 71 to 84), the DSM-IV-TR states:

Borderline Intellectual Functioning describes an IQ range that is higher than that for Mental Retardation (generally 71-84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

(*Id.* at p. 48.)

2007 Individualized Education Program

11. In October 2007, while Claimant was attending a private religious school, Father requested an assessment for special education and related services from Los Angeles Unified School District (LAUSD). LAUSD administered assessments in the areas of general academics, health, general ability and social-emotional functioning. The academic testing results indicated that Claimant performed above average for his age and grade with regard to his English/verbal scores, and below average with regard to mathematical calculation and reasoning. The health assessment indicated that Claimant was receiving treatment for mental health issues, and had been hospitalized in the past for mental health related problems, and was taking medication. His general abilities were assessed to be strong in the areas of verbal and nonverbal cognitive skills, auditory processing, reading and interpersonal communication. He had deficits in auditory visual and visual-motor processing, deficits in attention and planning, and suffered from depression. His social-emotional functioning showed that Claimant had strengths in his adaptive skills at school, he generally understood, showed average effort, was bright and articulate, participated and had many good one-on-one conversations. However, he was socially

isolated. Claimant was made eligible for special education and related services pursuant to an individualized education program (IEP), under the eligibility category of specific learning disability. The IEP team did not find Claimant to be mentally retarded. The IEP team cited Claimant's cognitive processing deficits, and deficits in planning and attention, as the reasons for his need for special education and related services. The IEP team offered a general education placement at North Hollywood High School with counseling and support in math. Father declined this offer, and elected to have Claimant attend Valley Torah, a private religious high school.

2009 Department of Rehabilitation Psychological Evaluation

12. In 2009, Claimant was administered a psychological evaluation by the California Department of Rehabilitation. The assessor interviewed Claimant and noted Claimant's report of a nine-day psychiatric hospitalization due to a "breakdown" within the past year. Claimant was on a medication regime for his mental health issues and for tics. Claimant appeared to the assessor to be pleasant, friendly, cooperative, well-dressed, well-oriented, and capable of working on tasks at a fast pace.

13. The assessor administered the following standardized IQ tests: the Shipley Institute of Living Scale (Shipley) and the Raven's Progressive Matrices (Raven's). The Shipley is verbal measure of general intelligence, i.e. an IQ test used as an equivalent to the Wechsler Adult Intelligence Scale (WAIS). Claimant had a significantly lower abstract reasoning subtest score than his vocabulary score. His vocabulary scores were average at 105. However, his abstract reasoning scores were below 70, or very significantly below average; thus, he could be expected to have difficulties with choices and decision-making. The assessor opined that this pattern is seen in those with long-term substance abuse, major mental illness, or a learning disability.⁵ The Raven's also showed discrepant subtest scores, with reading pronunciation being above average, spelling average, and arithmetic very significantly below average. The assessor also administered the Wide Range Achievement Test-Revised (WRAT-R). On the WRAT-R, which measures academic achievement, Claimant scored at the 12th grade level in reading pronunciation, the 11th grade level in spelling, but only 5th grade level (in the 1st percentile) in arithmetic.

⁵ According to the testimony at hearing of Service Agency staff psychologist Dr. Sandi Fischer, the Department of Rehabilitation's assessment showed subtest scores too discrepant to derive reliable full-scale overall IQ scores. Thus, although the assessment showed overall IQ scores of 80 on the Shipley (low end of "below average") and 83 on the Raven's (below average), these scores are unreliable and are disregarded.

14. The Department of Rehabilitation sponsored Claimant at a San Fernando Valley Center for Independent Living, a non-profit, non-residential center for persons with disabilities that provides a variety of services, such as independent living skills, assistance with housing and vocational training.

2012 Service Agency Assessments

15. In 2012, the Department of Rehabilitation and Father requested that the Service Agency assess Claimant's eligibility for regional center services. Service Agency conducted a Social Assessment, and a Psychological Assessment, in July-September 2012, when Claimant was 22 years old.

16. The Social Assessment noted that Claimant had deficits in organization and required prompting to accomplish chores. Claimant was well-groomed, and could attend to personal hygiene, with some prompting. With regard to household chores, he required constant reminders. He was unable to market independently because he could not count change. He never learned to drive, but could take public transportation independently. He was socially isolated except amongst family and had no recreation or hobbies. He did not exhibit disruptive behaviors, and safety was not an issue in the home setting but might be of concern in the community. Claimant could respond to his name; could recite his first and last name; could recite his address and phone number; knew his age and date of birth; knew the days of the week, months of the year and the seasons; knew major holidays; understood concepts of morning, noon and night; recognized colors and shapes with some deficits; could identify body parts; could count 1-100; was unable to complete addition, subtraction, multiplication or division; could read simple words and sentences; could print with difficulty; and had difficulty signing his name.

17. The Psychological Assessment was conducted by Clinical Psychologist John Lamont, PhD, who has conducted numerous assessments for the Service Agency, in order to determine Claimant's current levels of cognitive and adaptive functioning, and the presence or absence of Autistic Disorder.

18. Dr. Lamont administered the following standardized assessments: Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV); Vineland Adaptive Behavior Scales (Vineland); Developmental Test of Visual-Motor Integration, and the Autism Diagnostic Interview-Revised (ADI-R).

19. The WAIS-IV contained subtests for verbal comprehension, on which Claimant scored 100 or average; perceptual reasoning, on which Claimant scored 71 or low average; working memory, on which Claimant scored 74 or low average, and processing speed, on which Claimant scored 79 or low average. Dr. Lamont found that the scores among the subtests were so discrepant that a full scale IQ score could not be considered valid, therefore none was calculated. However, none of the scores fell in the deficient range, i.e. 70 or below. Therefore, the possibility of mental retardation was rejected. But Dr. Lamont referred Claimant to the Service Agency's

consideration for fifth category eligibility, citing Claimant's inconsistent scores on the IQ subtests and on the scales of adaptive behavior, some of which were very low, together with anecdotal information from Father suggesting very poor capacity for self-direction and independent living.

20. Dr. Lamont found that Claimant did not exhibit the required symptomatology for Autistic Disorder. Claimant made good eye contact and used gestures to regulate social interaction; although a loner, he shared enjoyment with Father and told Father about things in which he was interested; he showed emotional reciprocity; he could initiate conversation and sustain it for ten minutes or more; he showed no evidence of stereotypic or repetitive use of language or idiosyncratic use of language; and he engaged in social imitative play activities. Dr. Lamont found that Claimant did not exhibit the DSM-IV-TR's required two symptoms in its subcategories involving social interaction. Although Claimant was socially isolated and as a result exhibited one of the symptoms ("failure to develop peer relationships appropriate to developmental level"), he did not exhibit symptoms in any of the other areas (involving facial expressions or eye-to-eye contact, sharing of enjoyment with others, and social reciprocity).⁶ Nor did Claimant exhibit the DSM-IV-TR's requirement of at least one symptom in the area of communication (development of spoken language, ability sustain a conversation; stereotypes or repetitive use of language; lack of social imitative play). Dr. Lamont found that Claimant had no deficits in any of these areas. Nor did Claimant exhibit the DSM-IV-TR's requirement of at least one symptom in the area of patterns of behavior (adherence to specific routines or rituals, preoccupation with restricted patterns or interests, stereotypes of repetitive motor mannerism, and preoccupation with parts of objects). Dr. Lamont found that Claimant had only mild repetitive motor mannerisms in that he wrung his hands and chewed on his cuticles. Overall, Dr. Lamont found that Claimant exhibited only one of the 12 diagnostic criteria, rather than the six of 12 as required, and thus did not meet the DSM-IV-TR's diagnosis of Autistic Disorder.

Service Agency's Determination

21. Service Agency's Eligibility Committee, consisting of a staff medical doctor, staff psychologist and staff intake specialist, found that Claimant did not meet the definitions of either autism or mental retardation, and therefore was not eligible for services under those categories.

22. Service Agency also determined that Claimant did not qualify for services under the fifth category of eligibility, i.e. that he did not have a condition that is closely related or similar to mental retardation or requires treatment similar to that required for mentally retarded individuals.

⁶ Dr. Lamont also found that this lack of at least two symptoms in the area of social interaction precluded a diagnosis of Pervasive Developmental Disorder (PDD), PDD-NOS, and Asperger's Disorder.

23. In making that determination, Service Agency applied the Association of Regional Center Agencies “Proposed Guidelines for Determining 5th Category Eligibility for the California Regional Centers” (Guidelines). The Guidelines dictated that for an individual’s condition to be considered “closely related to mental retardation,” that individual’s general IQ score should fall within the low borderline range of intelligence, i.e. ranging from 70-74, and that the higher the score above 70, the less similar to mentally retarded a person should be considered. According to the Guidelines, the higher an individual’s IQ score rose above 70, the more increasingly essential it would be to demonstrate substantial adaptive deficits, and that these deficits were “clearly related to cognitive limitations.” The Guidelines also dictated that, where an individual had an IQ score in the low borderline range of IQ 70-74, but with discrepant subtest scores such that any subtest score exceeded 85, “the more difficult [it is] to describe the individual’s general intellectual functioning as being similar to that of a person with mental retardation. In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with mental retardation.” Service Agency, considering that Claimant’s verbal comprehension subtest scores in Dr. Lamont’s testing exceeded 85, believed that Claimant did not qualify as a person with a condition “closely related to mental retardation.”

24. In making the determination whether Claimant qualified for services under the alternate language in the fifth category, as an individual who “required treatment similar to that required for individuals with mental retardation,” Service Agency considered the Guidelines pertaining to this determination. These stated that when determining whether an individual “requires treatment similar to that required for mentally retarded individuals,” the team should consider the nature of the training and intervention required for an individual who does have global cognitive deficits, for example, in pertinent part, that “individuals who require long term training with steps broken down into small, discrete units taught through repetition may be eligible.” At hearing, Service Agency staff psychologist Sandi Fischer explained that the treatment required for mentally retarded individuals is training to achieve concrete goals, for example, how to make a bed, taught through a treatment plan that breaks down each component skill into small incremental steps, with repetition until the individual attains that skill, followed by repetition for retention purposes and skill-maintenance; and combining the discrete component skills into the entire task.

25. Although not so stated in the Guidelines, Dr. Fischer explained that Service Agency also applies an additional requirement: that the individual’s need for the treatment must be based on cognitive deficits. In so requiring, Service Agency applied the Guideline’s guidance on whether an individual has a condition “closely related to mental retardation” when determining whether the individual “requires treatment similar to that required for mentally retarded individuals.” Dr. Fischer explained that the Service Agency always requires cognitive levels close to mental retardation when assessing fifth category eligibility, across all domains. Thus,

although an individual might have low scores in certain areas, if the delays were not global in all domains, a diagnosis of mentally retarded was ruled out, as was fifth category eligibility. She cited the discrepant scores in Dr. Lamont's assessment, and opined that, because of the average verbal comprehension scores, Claimant's condition was not "similar to mental retardation." Nor would Claimant qualify under the fifth category as an individual who "requires treatment similar to that required for mentally retarded individuals" unless he also had globally low cognitive scores. In other words, in assessing fifth category eligibility, Service Agency never relies solely on an applicant's adaptive skills, but always looks for low cognition, and moreover always looks for low cognition in all domains; thus a high cognitive score in any single domain will preclude fifth category eligibility. Dr. Fischer explained that there can be many different reasons for low adaptive functioning, for example depression or psychological ailments like schizophrenia, which are specifically excluded from the definition of developmental disability, and therefore, cognitive functioning must be included in the analysis.

26. In reliance on the descriptions of Claimant in the LAUSD IEP, and the subtest scores from the Department of Rehabilitation's WRAT-R assessment, as well as Dr. Lamont's results, Service Agency considered that Claimant's deficits were not cognitive in nature. Service Agency therefore determined that Claimant did not qualify as a person who "requires treatment similar to that required for mentally retarded individuals."

January 2013 Private Neuropsychology Consult

27. In January 2013, Claimant obtained a Neuropsychology Consult from a private psychologist. The assessor re-administered the WAIS-IV. The assessor also gave Father three questionnaires designed to elicit information pertinent to Autistic Disorder: the Asperger Syndrome Diagnostic Scale (ASD), the Gilliam Autism Rating Scale (GARS) and the Autism Screen Questionnaire (ASQ).⁷

⁷ The private neuropsychologist's report was a poorly organized, unsubstantiated and unconvincing document. It randomly, and without organization, reported the subtest results of various assessments, without clarifying which subtest related to which assessment. In the crucial area of assessing Claimant with regard to Autistic Disorder, the report failed to report any actual results, stating only perfunctory conclusions, and failing to provide underlying data to support them. Thus, although the report indicated an average probability of autism and a very likely probability of Asperger's, these results are disregarded in light of Dr. Lamont's contrary and more credible findings. The assessor also obtained cognitive scores from administering the WAIS-IV. The results showed higher verbal subtest scores and lower perceptual reasoning and processing speed subtest scores, and to that extent they corroborated Dr. Lamont's results. In all other respects, the cognitive findings lacked credibility and are disregarded. At hearing, Dr. Fischer credibly opined that the WAIS-IV should not have been re-administered so soon after Dr. Lamont's

Father's Testimony at Hearing

28. Father testified credibly at hearing about Claimant's functional limitations, and his concerns for Claimant's future ability to live independently. Claimant is an affectionate, loving and caring person. He is unable to perform basic arithmetic. He has had no success whatever in finding gainful employment. He lives at home, where he must be monitored constantly. He is enrolled in a Department of Rehabilitation program that trains in independent living skills. He is unable to keep his room clean, as he cannot learn how to do so, even though this is one of his only household chores given by Father. Claimant went on-line on the computer to find step-by-step instructions for how to clean his room, and the instructions helped him somewhat, but then he forgot how. To accomplish any task, Claimant requires very specific step-by-step instructions, but he cannot retain the skills. For example, to cook, he must be told to take the pan, put it on the stove, take the oil, open the oil, pour the oil into the pan, wipe the oil, and the like. Without such step-by-step instructions, he is unable to perform any tasks. Other than cleaning his room, Claimant's other assigned household chores are to clean up after the dog, and do the recycling, but he cannot remember these and will not do them without constant reminders. He can do laundry but not well, so his clothes are wrinkled and have bleach spots on them; he can dress but not well, so he must be told to straighten his collar daily; he can shave but not well, as he misses spots; he is unaware when his hair needs trimming. Claimant cannot manage money as he cannot count change, and is therefore unable to market for himself with cash; he can use a debit card. He cannot drive, although he can take public transportation independently. He has no telephone skills, as he forgets messages. Father has been told in the past, and has reported to the assessors, that Claimant suffered brain damage at birth, such that the part of the brain that controls math, analysis, planning, organizing and writing, does not function.

LEGAL CONCLUSIONS

1. Claimant has established that he suffers from a developmental disability entitling him to Service Agency's services.
2. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)
3. An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-

assessment, and that, to the extent the report calculated a full-scale IQ, it was unreliable given the underlying discrepancies in the domains assessed.

4716.) Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has met his burden of proof in this case.

4. The Lanterman Act is a comprehensive statutory scheme to provide "[a]n array of services and supports . . . which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community." (Welf. & Inst. Code, § 4501.) The services and supports should "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (*Id.*)

5. In enacting the Lanterman Act, the Legislature codified the state's responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. A regional center is required to provide services and supports for eligible consumers in accordance with the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.)

6. To be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

7. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

8. California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

9. In addition to proving a “substantial disability,” a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism⁸ and cerebral palsy. The fifth and last category of eligibility is listed as “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512, subd. (a).)

⁸ The plain language of the Lanterman Act’s eligibility categories includes “autism” or Autistic Disorder, but it does not include the other PDD diagnoses in the DSM-IV-TR (Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and PDD-NOS).

10. The Legislature did not define the fifth category, requiring only that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512, subd. (a).) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or that it “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512, subd. (a).) In a case factually similar to that presented here, the appellate court recently decided eligibility in the fifth category may be based on the established need for treatment similar to that provided for individuals with mental retardation, notwithstanding an individual’s relatively high level of intellectual functioning. *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462 (*Samantha C.*). The court confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation.

11. In order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, impaired intellectual or social functioning which originated as a result of a psychiatric disorder, if it was the individual’s sole disorder, would not be considered a developmental disability. Nor would an individual be considered developmentally disabled whose only condition was a learning disability. A learning disability is “a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.” (Cal. Code Regs, tit.17, § 54000.)

12. The term “cognitive” is defined as “the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience.” (Cal. Code Regs, tit.17, § 54002.)

Analysis

13. Claimant has established that he suffers from a developmental disability entitling him to Service Agency’s services. Claimant has a disability that originated before the age of 18 years, continues and can be expected to continue indefinitely, and that constitutes a “substantial disability” within the Lanterman Act’s definition of that term, in that it causes significant functional limitations in three or more of the major life activities of self-care (he cannot accomplish laundry, cooking, marketing or other household chores); learning (he cannot learn how to clean his room); mobility (he cannot drive); self-direction (he must be monitored constantly, cannot remember to do recycling or clean up after the dog without constant reminders); capacity for independent living (he cannot manage money or transact business in cash) and economic self-sufficiency (he cannot maintain gainful

employment), and within the regulatory definition of that term, in that it also results in major impairment of cognitive functioning (he cannot solve problems with insight, adapt to new situations, think abstractly, or profit from experience) and/or social functioning (he has no friends, recreation or hobbies and is socially isolated). (Welf. & Inst. Code, § 4512, subds. (a) & (l); Cal. Code. Regs., tit. 17, §§ 54001, subd. (a) & 54002.) Claimant has also established that his disability fits into the second prong of the fifth category as a “disabling condition . . . [that] require[s] treatment similar to that required for individuals with mental retardation.”⁹ (Welf. & Inst. Code, § 4512, subd. (a).) Thus, he is eligible. (Factual Findings 11-20, 28; Legal Conclusions 6-12.)

14. The testimony of Dr. Fischer established that the treatment required for individuals with mental retardation is training to achieve concrete goals, broken down into discrete component skills, with step-by step instruction for maintenance and retention of the component skills. The Guidelines confirm this, requiring that, when assessing this type of fifth category eligibility, the eligibility team should consider that an individual who requires “long term training with steps broken down into small, discrete units taught through repetition may be eligible.” The evidence established that this is precisely the type of training Claimant requires. Claimant has difficulty with choices and decision-making, deficits in organization, requires prompting and constant reminders to accomplish chores, a poor capacity for self-direction, and cannot retain skills. To learn how to clean his room, Claimant found step-by-step instructions helpful but could not retain them; to cook, Claimant must be told to take the pan, put it on the stove, take the oil, open the oil, pour the oil into the pan, wipe the oil, and the like. Thus, Claimant’s disabling condition requires step-by step instruction broken down into small, discrete units taught through repetition, which is the “treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512, subd. (a).) (Factual Findings 11-20, 24, 28; Legal Conclusions 6-12.)

⁹ Claimant is not eligible for services under the eligibility category of autism. None of the assessments that have been performed on Claimant by the Department of Rehabilitation, the Service Agency, or the LAUSD IEP conducted in 2007, found him to be autistic. As reflected in Dr. Lamont’s Psychological Assessment, Claimant did not exhibit the required symptomatology for autism. As reflected in Father’s testimony, Claimant is affectionate, loving and caring. Claimant relies on his private psychologist assessment, finding a very likely probability of Asperger’s Disorder, however the assessment is unpersuasive. Dr. Lamont’s assessment more persuasively rules out Asperger’s Disorder. Moreover, Asperger’s, as opposed to Autistic Disorder, does not fall within the Lanterman Act’s definition of a developmental disability. (Factual Findings 5-7, 12-20, 27-28; Legal Conclusion 9.)

15. Service Agency's additional imposition of the requirement of low cognition across all domains, such that even one average score in any single domain would preclude fifth category eligibility, was over and above the statutory and regulatory language. As the Guidelines indicate, such reliance on cognitive scores is more relevant to the first prong of fifth category eligibility, conditions closely related to mental retardation, but is not specifically required by either the Lanterman Act or by the Guidelines with respect to the second prong of fifth category eligibility, conditions requiring treatment similar to mental retardation. (Factual Findings 21-26; Legal Conclusions 6-12.)¹⁰

16. *Samantha C.* confirms that eligibility in the fifth category may be based on the established need for treatment similar to that provided for individuals with mental retardation, notwithstanding an individual's relatively high level of intellectual functioning. In that case, an individual who suffered hypoxia (oxygen deprivation) and brain damage at birth, and who suffered from visual and auditory processing problems (*Samantha C.*, *supra*, 185 Cal. App. 4th at p. 1470), was found to be eligible under the Lanterman Act despite full-scale IQ scores in the average range between 90-99 (*id.* at pp. 1473, 1479, 1492-3). She had been assessed numerous times and had various diagnoses including learning disabilities, attention deficit disorder, and attention deficit hyperactivity disorder, some of which were psychiatric conditions within the DSM-IV-TR and thus excluded, and she was neither autistic nor mentally retarded. (*Id.* at pp. 1472-1478.) Like Claimant here, she scored above average in certain domains (in her case, vocabulary and comprehension) and poorly on others (in her case, working memory and processing speed), but all her scores were a bit higher than those for persons with mental retardation. But her adaptive skills were poor. (*Id.* at pp. 1472-1478.) She was considered by some, including the regional center in her case and several triers of fact, to have a disabling condition that most closely resembled learning disabilities or psychiatric conditions that were excluded from eligibility. (*Id.* at pp. 1477-1481.) The appellate court, however, found that her condition was substantially disabling, and that the only reasonable inference was that it was a result of birth injuries that were not solely excluded learning disabilities or psychiatric disorders. Relying on the second prong of the fifth category, the court found her eligible, despite the fact that her higher cognitive

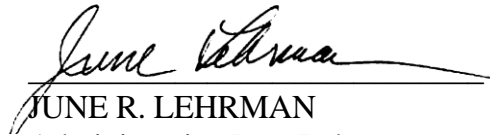
¹⁰ Moreover, although Claimant's cognitive subtest scores obtained by the Department of Rehabilitation psychological evaluation and by Dr. Lamont showed average vocabulary and verbal comprehension scores of 100 or more, his processing speed was assessed at 79, and in all other domains he scored in the low 70's or below 70. Taking into account the five point margin of error established by the DSM-IV-TR, and the absence of any reliable full scale IQ score, it appears that Claimant's subtest scores in all domains other than verbal comprehension and vocabulary ranged close to what would have been required even for a determination that his condition was, in fact, closely related to mental retardation, were such a determination required. (Factual Findings 8-20, 27.)

functioning rendered her condition neither mental retardation nor closely related to mental retardation, but rather because the nature of her adaptive deficits required treatment similar to that required for individuals with mental retardation. (*Id.* at pp. 1492-1493.) Such is the case here. Therefore, Claimant is eligible. (Factual Findings 1-28; Legal Conclusions 1-16.)

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal is granted. Service Agency shall accept Claimant as a client.

DATED: April 11, 2013


JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.